ATTACHMENT A

May 15, 2002 NON-CONFIDENTIAL VERSION

The Honorable Michael W. Lewis
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN 55401-2138

Re: MPUC Docket No. P-421/CI-01-1373 - "Investigation Into Qwest's Compliance with Section 271(d)(3) of the Telecommunications Act of 1996 that the Requested Authorization is Consistent with the Public Interest, Convenience and Necessity"

Dear Judge Lewis:

Pursuant to Minnesota Rules, Part 7829.0900, as well as procedural and evidentiary rules allowing relevant testimony of non-party witnesses, Eschelon Telecom, Inc. (Eschelon), submits these written comments and enclosed affidavit for consideration in this matter. As documents and information relating to Eschelon have been offered into evidence and are the subject of discussion, Eschelon believes it is appropriate to request an opportunity to comment. Eschelon will make witnesses available to respond to questions, if desired. Because Eschelon is responding to materials that have been marked confidential, Eschelon also designates the related portions of these comments, as well as the enclosed affidavit, as confidential.

This is a docket about Qwest and its qualification for 271 approval. As to this over-arching issue, Eschelon agrees with the conclusion of W. Clay Deanhardt, in an affidavit submitted by the Minnesota Department of Commerce (DOC), that there has been "a pattern of Qwest leveraging its control of the network through its wholesale division to benefit the efforts of its retail arm to obtain authority to offer interLATA long distance services." *See* Affidavit of W. Clay Deanhardt, p. 11, lines 3-5, MPUC Docket No. P-421/CI-01-1373 (May 3, 2002) ["Deanhardt Affidavit"]. As part of that pattern, as pointed out in documents introduced by Mr. Deanhardt, Qwest sought to appropriate all documents related to an audit process that documented problems with Qwest's switched access minutes reporting (even though switched access reporting is an issue relevant to Qwest's 271 bid), *id.* p. 5, lines 18-21 & p. 9, lines 13-24; Qwest offered a monetary inducement to obtain testimony whenever requested by Qwest in a manner suitable to Qwest substantively, *id*. p. 9, lines 3-12;[1] and Qwest continued to violate Commission

[1] Eschelon refused to sign Qwest's documents containing these objectionable terms.

orders requiring it to stay termination liability assessments for retail-to-resale conversions by charging them and then forcing a written agreement to obtain compliance with the Commission's Order, *id*. p. 10, lines 5-14. Eschelon confirms that Qwest engaged in this anti-competitive conduct.

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[3] The "10% discount" was part of an arrangement under which Qwest was supposed to purchase consulting services from Eschelon. Eschelon complained that the UNE-Eschelon ("UNE-E") rates were too high, as compared to the UNE-Platform ("UNE-P") rates. Rather than reduce the rates, Qwest suggested an unwritten pricing arrangement. Eschelon objected to that proposal and suggested a legitimate mechanism for Qwest to purchase valid consulting services from Eschelon to be reflected in a written agreement. Throughout discussions, Qwest suggested that it was concerned about what it characterized as unfair or overbroad use of opt-in provisions. Qwest's repeated protestations on this issue required Eschelon to present its proposal in light of this concern to gain acceptance of Eschelon's legitimate proposal. Therefore, Eschelon's President pointed out to Qwest that the proposal "'makes it more difficult for any party to opt into our agreements.'" Deanhardt Affidavit, p. 6, lines 18-19. His use of the term "opt into" shows that Eschelon's President envisioned at the time that, although more difficult to adopt because of the condition imposed by Qwest, the term may be available to other CLECs. Qwest could have filed this agreement with the commissions and made it available to other CLECs, but it did not do so. Eschelon welcomed the concept of being able to provide consulting to Qwest, because Eschelon believed that service improvements would result from Qwest taking advantage of Eschelon's CLEC perspective. Because the agreement was in writing, Eschelon believed that Qwest would have to honor it. Other CLECs would also ultimately benefit from improvements that were to be implemented as a result of the consulting services (and thus there was a royalty-type fee). Service quality improvements were critical to Eschelon's business,

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and Eschelon made a genuine effort to implement the consulting provision to attempt to achieve those improvements. After execution of the agreement, Eschelon formed teams organized by subject matter and spent significant resources identifying issues and preparing to meet with Qwest. In discovery, Eschelon has provided to the DOC more than 500 pages documenting Eschelon's efforts to launch the consulting effort. Despite Eschelon's efforts, Qwest refused to form corresponding teams or to otherwise truly accept consulting services. The fact that Qwest began to breach the agreement and treat it as a sham almost immediately sheds light not on the legitimate consulting arrangement proposed by Eschelon but on ***Qwest's*** intent and purpose in making the agreement. Moreover, since then, it has come to light that Qwest was entering into other purchase agreements, such as agreements ostensibly to purchase fiber capacity, for a discount. This additional information suggests that, from Qwest's perspective, the discount was a term of interconnection for Qwest, which never treated it as anything else. Either Qwest's rates are so inflated that these discounts still allow Qwest to earn a profit, or Qwest was willing to sell products below cost to keep other competitors out of the market. This suggests either anti-competitive behavior (rates above cost) or an antitrust violation (rates below cost in monopoly environment). (As the FCC has said that the issue of whether rates are cost-based is relevant to the 271 inquiry, the Commission may want to address this issue as part of its 271 proceedings as well.) Because Qwest imposed confidentiality restrictions on the agreements with various carriers, only Qwest was in a position to know that the term, while in the form of various types of purchase agreements, may have been, in reality, a term of interconnection.

[4] Also, although Qwest initially described the Escalations and Business Solutions Letter (*see* WCD-3) to Eschelon as a beneficial way to avoid disputes and work on a "business-to-business" basis, Qwest in fact used that letter to threaten Eschelon with alleged breaches and mischaracterize Eschelon as a "bad business partner." Qwest would call Eschelon's President or others and complain, often mischaracterizing facts and demanding an immediate answer without time for a proper response. Eschelon found itself in the position of having to justify itself to Qwest to avoid even worse consequences.

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As indicated, Eschelon nonetheless agrees with Mr. Deanhardt's final conclusion that Qwest has leveraged "its control of the network through its wholesale division to benefit the efforts of its retail arm to obtain authority to offer interLATA long distance services." *See* Deanhardt Affidavit, p. 11, lines 3-5. Although Mr. Deanhardt reaches this conclusion, he may under-estimate the level of pressure that Qwest, with its monopoly power and control of the network, has been able to exert, particularly in the current economic climate. As a start-up company without the resources to take on Qwest on all fronts, Eschelon has had to deal with that pressure to the best of it abilities, while staying within the law in an area with little guidance or precedent. Doing so has not been easy, due to the pressures exerted by Qwest – Eschelon's only supplier in the vast majority of situations.[5]

Eschelon cannot control the conduct of Qwest, against which Eschelon has little bargaining power. And, Eschelon has had to choose its battles, given the risks of opposing its monopoly supplier. When a legal obligation belonged to Qwest, therefore, Eschelon could not take responsibility for Qwest's actions, nor should Eschelon or other CLECs have to do so. Qwest is responsible for meeting Qwest's obligations. For example, with respect to Qwest's obligation to file agreements, Eschelon agrees with the following quotation by Anthony Mendoza, the DOC deputy commissioner for telecommunications: "'[Qwest] is the only company that is required to disclose them to

[5]Although Eschelon reached agreements with Qwest in some instances, Eschelon also took the high-stakes risk of denying Qwest requests/proposals when necessary to avoid improper conduct and protect Eschelon's interests. *See*, *e.g.*, Qwest's Proposed Purchase Agreement & Qwest's Proposed Confidential Billing Settlement Agreement (Oct. 30, 2001) ["Qwest October 2001 Proposal"] (attached to, and discussed in, Eschelon's Level 3 Escalation Letter to Joseph P. Nacchio, dated Feb. 8, 2002), Exh. WCD-21.

the PUC.'" *See* "Qwest made secret agreements with competitors, regulators say," Steve Alexander, Minneapolis, *Star Tribune*, Feb 15, 2002. The obligation belongs to Qwest.[6]

Similarly, with respect to the 271 proceedings, the obligation to participate fully belongs to Qwest, as the party requesting 271 approval. Qwest has said that McLeod is its largest CLEC wholesale customer and Eschelon is its second largest CLEC wholesale customer. Qwest obtained, but did not disclose to regulators in the 271 proceedings, agreements with both of its largest CLEC wholesale customers not to oppose Qwest's 271 bid. Unlike Eschelon and McLeod, which have no legal duty to participate, Qwest bears the ultimate burden of proof as to its commercial performance on all checklist items, even if "no party files comments challenging compliance with a particular requirement." FCC BANY Order, ¶ 47.[7] Regardless of whether CLECs participate in 271 proceedings, therefore, Qwest has a duty to disclose problems with compliance as part of those proceedings.[8] Eschelon was certainly making Qwest aware of problems it

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[6] The federal Act places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act. Placement of the burden on Qwest makes sense, because Qwest has superior access to information relevant to whether a term or condition is of the type for which filing is required. (For example, while a CLEC may believe that a term is in settlement of an individual dispute, Qwest is in a position to know whether the dispute is truly unique or the experience is shared by other CLECs and whether the same or similar solution is suitable for, and should be made available to, other CLECs.) Nothing in the agreements prevented Qwest from filing them. Qwest could have requested written consent for disclosure from CLECs at any time, if Qwest claims it was concerned about the confidentiality provisions that Qwest required as part of agreements.

[7] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ["FCC BANY Order"].

[8] Eschelon does not know all that has transpired in the 271 proceedings and whether all information was disclosed. That is a matter for the commission to determine. Eschelon did notice the following statement by Qwest, which appears to create a different impression from Eschelon's experience: "Qwest is unaware of any circumstance, or any allegation of a circumstance, in which a party was prevented from offering any Utah-specific evidence at the multistate workshop specifically designed to address these issues. Qwest now asks the Commission to confirm that the parties opposing Qwest's section 271 authorization have had sufficient opportunity to present Utah-specific evidence supporting the UNE pricing, intrastate access charge, and other claims already resolved in Qwest's favor by Staff. Qwest further asks that the Commission clarify that, under the terms of the Report on Public Interest, it will entertain only such new evidence or arguments that the parties were demonstrably unable to offer in the Multistate Proceeding. Qwest submits that no such Utah-specific evidence or arguments exist." Qwest Corporation's Petition For Clarification And Reconsideration Of The Commission's Report On The Public Interest, *In the Matter of the Application of QWEST CORPORATION for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B),* Utah Docket No. 00-049-08, p. 6 (March 12, 2002). Although Qwest may argue that Eschelon and McLeod were not "prevented" from submitting evidence because Eschelon and McLeod "agreed" not to oppose Qwest in 271 proceedings, Qwest's decision not to disclose these agreements precluded parties and commissions from making that judgment for themselves. Moreover, Qwest's latter representation (that no Utah-specific evidence or arguments existed relating to UNE pricing, intrastate access charges, and other issues) is simply not the case. Before, during, and after the time that Qwest made this statement, Eschelon was raising evidence and arguments (including Utah-specific information) relating to problems with UNE pricing, access charges and other issues with Qwest. The evidence and arguments did exist and were known to Qwest.

was experiencing in the states in which Eschelon operates (Arizona, Colorado, Minnesota, Oregon, Utah, and Washington). Only Qwest controls, and is responsible for, whether Qwest meets its obligation to disclose those issues in discovery and 271 proceedings when Qwest has an obligation to do so. Qwest's conduct throughout the course of the 271 proceedings in meeting this obligation is relevant to the determination of whether granting 271 approval to Qwest is in the public interest. The public interest analysis, therefore, is broader than whether Qwest should have filed certain agreements and includes whether Qwest acted with appropriate candor to the commissions about the reason for CLEC non-participation in proceedings and with respect to CLEC concerns about service performance known to Qwest at the time.[9]

A key reason that the Commission and DOC are now able to review these issues is that Eschelon tried to ensure that matters were documented, despite Qwest proposals to enter into unwritten agreements and Qwest requests that Eschelon stop documenting events and turn over documents to Qwest. It has been a difficult task to document events in a manner that attempts to avoid threats and retaliation by Qwest while still resulting in documentation of some kind. The focus on whether agreements were ***filed*** with commissions fails to recognize the feat the Eschelon accomplished by getting anything in writing at all.[10] In contrast, McLeod's agreement not to oppose Qwest in 271 proceedings, for example, was reportedly an oral agreement. *See* "States Probe Qwest's Secret Deals To Expand Long-Distance Service," *Wall Street Journal*, p. A10 (April 20, 2002) ("As part of that deal, McLeod agreed to stop its opposition to the Qwest-U S West merger. The company also had a verbal agreement to not oppose Qwest's entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.").[11] Eschelon understands how Qwest could extract such an oral agreement, given Qwest's monopoly power and control over the network, and the circumstances confronting CLECs faced with Qwest's tactics. Eschelon obtained written agreements and confirmed events in writing. Mr. Deanhardt and others reviewing these issues are able to track and discuss the Eschelon agreements precisely because the information is in writing. Qwest would have had it otherwise, a fact that the Commission may want to review as part of the public interest analysis.

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[9] The fact that some matters have since been settled does not mean that the matters never existed or did not need to be disclosed by Qwest at the time, nor does it mean that all underlying problems that lead to the settlement have been resolved so that other CLECs will not experience them. Eschelon still has unresolved disputes with Qwest, including the matter of missing switched access minutes and the 100% inaccuracy of the UNE-Star bills received from Qwest.

[10] Although written, the commitments were nonetheless not fully honored. Qwest breached the agreements in several respects, and promises made (such that UNE-Star would be a working alternative to UNE-P) did not materialize. *See*, *e.g.*, Affidavit of J. Jeffrey Oxley, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, PUC Docket No. P-421/C-01-391 (April 18, 2002) (copy attached).

[11] As Qwest knew when proposing unwritten agreements, opting in to an unwritten agreement is a highly unlikely scenario. If the agreement is written, at least there is a better chance that the agreement will be produced in discovery or otherwise become known so that, if a determination is made that the agreement should have been filed, other CLECs may take advantage of it.

Qwest's conduct with respect to Eschelon, McLeod, or other CLECs with which Qwest had agreements (such as Covad, New Edge, or the other small CLECs),[12] needs to be reviewed in context. Qwest created, and is responsible for, the current situation and the fact that the market is still not truly open to competition. In the fall of 2000, Qwest's Chairman and Chief Executive Officer, Joseph Nacchio, publicly announced an agreement with McLeod, which he characterized as a significant positive development. He stood before the Regional Oversight Committee (ROC) and told members that Qwest was going to go behind closed doors and work out differences with CLECs, rather than litigate them. Representatives of Qwest repeatedly said they wanted to work on a "business-to-business" basis with Eschelon, rather than litigate issues. They also continually attempted to distinguish Qwest from the former company, US West, and asked for time to make the transition to become a more CLEC-friendly wholesale business.[13] Other CLECs and the commissions probably heard these same kinds of statements. As the Escalations and Business Solutions Letter (*see* WCD-3) shows, Eschelon's management wanted to believe in the promise of a better relationship under new management and attempted to use the non-litigious path touted by Qwest. It didn't work.

From the lack of competition in the market and our continued service problems that have not all been solved by ongoing proceedings and testing, it is apparent that the litigious path hasn't worked either. AT&T and WorldCom have not only actively participated in the 271 proceedings but also both successfully brought complaints against Qwest for anti-competitive behavior. The complaints took a long time to litigate (much longer than companies like Eschelon could bear), and neither company received any compensation as a result of the behavior, even though they had to expend substantial resources proving the anti-competitive behavior (more resources that Eschelon could afford). Despite all of this, the market is not truly open. Competitors have been stymied. Regulators have been too.

In other words, regardless of the party or approach taken, Qwest has succeeded in stonewalling and preventing development of competition. This conduct supports Mr. Deanhardt's final conclusion.

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[12] See Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, MPUC Docket No. P-421/C-02-197 (March 19, 2002). The "small CLECs" include the following 10 CLECs: HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, Onvoy Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, VAL-ED Joint Venture, and WETEC. *See id*. ¶ 196.

[13] Qwest also made negative statements about AT&T and WorldCom, indicating that those companies were not really interested in getting into business but had their own agendas to keep Qwest out of the interLATA market. Qwest encouraged Eschelon management to be different from those companies and work with Qwest outside of the regulatory arena to develop a better business relationship. Eschelon's management did not agree with Qwest, but Qwest's statements about AT&T and Worlcom show Qwest's strategy of casting CLECs as "good" business partners or "bad" business partners.

Eschelon appreciates this opportunity to file comments and clarify the record. Eschelon also requests an opportunity for oral presentation pursuant to Minnesota Rules, Part 7829.0900.

Sincerely,

J. Jeffrey Oxley
Vice President, General Counsel, and Corporate Secretary

cc: Service List